Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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18 pp

QUESTIONS PRESENTED

1. Does the National Environmental Policy Act compel an agency to expand the scope of proposed actions in an environmental assessment to include every reasonably foreseeable and contemplated action?

2. What level of detail must an environmental assessment contain relative to an environmental impact statement under the National Environmental Policy Act?

PARTIES TO THE PROCEEDING

Petitioner, Ochoco Lumber Company doing business as Malheur Lumber Company, is an Oregon limited partnership. D.R. Johnson Lumber Company doing business as Prairie Wood Products is an Oregon corporation that has no parent or subsidiaries. Malheur Timber Operators and Northwest Forest Resource Council are Oregon nonprofit corporations that have no parent or subsidiaries.

Jeff Blackwood is the Forest Supervisor of the Umatilla National Forest, and the United States Forest Service is an agency of the United States Department of Agriculture.

Petitioners are not fully aware of the organizational status of respondents, but to the best of petitioner's knowledge, respondent Blue Mountains Biodiversity Project is a "project" of the League of Wilderness Defenders. Respondent Blue Mountain Native Forest Alliance is an alliance of environmental groups in eastern Oregon and southeast Washington. The Alliance is an inactive non-profit Oregon corporation whose corporate status expired in 1996 for failure to renew. Respondent Society Advocating Natural Ecosystems is an Oregon active assumed business name of four individuals. The Cascadia Fire Ecology Education Project has no corporate status and conducts educational hikes for the public.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Opinions and Orders Below 2

Jurisdiction 2

Statutes and Regulations 3

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 14

TABLE OF AUTHORITIES

FEDERAL CASES

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) 2

Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990) 10, 12-13

Kleppe v. Sierra Club, 427 U.S. 390, 404 (1976) 8-9, 11

Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) 12

Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 809 (8th Cir. 1998) 13

Rhodes v. Johnson, 153 F.3d 785, 788 (7th Cir. 1998) ... 13

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) 10-12

Sierra Club v. United States Forest Service, 46 F.3d 835, 840 (8th Cir. 1995) 10, 13

Fund for Animals, Inc. v. Rice, 85 F.3d 535, 546-47 (11th Cir. 1996) 13

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 6

National Environmental Policy Act of 1969,

43 U.S.C. § 4331 ..... 3, 10

42 U.S.C. § 4332(2)(C) 11

Pub. L. No. 104-19 § 2001, 109 Stat. 194, 240 (1995) 7

FEDERAL REGULATIONS

40 C.F.R. §§ 1500-08 ..... 3, 9, 11

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Appeals for the Ninth Circuit

Petitioner Malheur Lumber Company, et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit Court of Appeals opinion is reported at 161 F.3d 1208 (9th Cir. 1998) and is reprinted in petitioner's appendix at page A-1. The following Ninth Circuit orders are also contained in the appendix:

Order denying the emergency motion for injunction pending appeal. A-104.

Order granting an injunction following oral argument. A-106.

Order of clarification. A-108.

Second order of clarification. A-110.

The district court opinion is unreported and is set forth in the appendix at A-21. The following district court orders are also contained in the appendix:

Order granting summary judgment for defendants. A-99.

Order denying motion for injunction pending appeal. A-101.

JURISDICTION

The Court of Appeals filed its opinion on December 2, 1998. This writ is filed within 90 days after December 2, 1998 and is timely under Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The statute involved in this case is the National Environmental Policy Act of 1969, 43 U.S.C. § 4331 *et seq.* Also at issue are the statute's implementing regulations, 40 C.F.R. §§ 1500-1508.

STATEMENT OF THE CASE

Sometimes when lightening strikes it ignites more than trees. In this case, it ignited a public controversy of no less intensity but much longer duration than a wildfire.

In the summer of 1996, a lightening storm struck national forests in eastern Oregon. The resulting catastrophic Tower Fire raged out of control for nearly a month. The inferno torched approximately 51,000 acres, and, in some areas, consumed everything in its path.

While the fire still burned, Forest Service personnel began planning for the area's rehabilitation. Although the fires have long since been squelched, the resulting controversy over how to rehabilitate the devastated terrain continues to rage.

This case presents questions regarding the scope and detail of environmental analysis required by the National Environmental Policy Act ("NEPA"). Although these questions arise in the context of rehabilitating a vast area burned by wildfire, the scope and detail of environmental analysis is of concern to every federal agency that must prepare environmental assessment and impact statements.

The scope of environmental analysis issue involves whether the Forest Service must propose all fire salvage and rehabilitation measures simultaneously, or whether it can limit its proposal to the most severely burned area which is in greatest need of tree planting, erosion control, and timber salvage. The Forest Service used the latter, more focused approach in approving the Big Tower Salvage and Revegetation Project environmental assessment for timber salvage and rehabilitation on 4,200 of the most severely burned acres in the 51,000 acre Big Tower fire. The area targeted for salvage and rehabilitation was the high intensity burn area, where 90% or more of the trees were dead and the ground cover had been consumed. A-24.

The Forest Service contemplated additional salvage and rehabilitation projects in the less severely burned areas, but only one project had evolved to a concrete proposal at the time the Big Tower Environmental Assessment ("EA") was prepared and approved. A-34. This proposal, the 1996 Roadside Salvage, was accounted for in the Big Tower EA. Although the Big Tower Salvage and Revegetation Project area was limited to less than 10% of the area burned by the fire, the analysis of environmental effects of the Project extended to and beyond the 51,000 acre area to comprehensively evaluate mobile resources such as fish, wildlife, and soil. A-40 to A-41, A-76 to A-83.

The district court endorsed the timing choice of the Forest Service. It concluded that the agency had a rational basis for not developing all contemplated actions into proposals simultaneously, given the urgent need to prevent soil erosion through revegetation and to avoid further economic loss of deteriorating trees. A-61 to A-62.

The Ninth Circuit rejected the district court's reasoning and held that NEPA mandated the Forest Service to include every project that might occur on the entire 51,000 acre burn as a proposal in an EIS, even if the project was only contemplated. A-16 to A-18.

The detail of environmental analysis required in an EA also is at issue. Relative to environmental impact statements ("EISs"), EAs are more concise and less detailed. The reason for the distinction is that the two types of documents serve different purposes under NEPA, which is a procedural statute designed to protect our nation's resources by ensuring that federal agencies adequately evaluate the environmental consequences of proposed actions. An EA guides an agency in deciding whether the time, money and energy involved in preparing an EIS is warranted. This is a particularly important consideration where, as here, an agency is responding to a devastating wildfire that wreaked environmental havoc across an ecosystem.

The Forest Service evaluated erosion and sedimentation in an interdisciplinary ecosystem report, the Tower Fire Ecosystem Analysis, which the EA incorporated by reference. A-29, A-70 to A-71. The Analysis mapped the entire 51,000 acre fire area by soil type, burn intensity, and erosion potential. A-71. Because quantitative sedimentation data was not available, the Forest Service tried to gauge erosion using in-stream sediment boxes, although the efforts were unsuccessful because of heavy sediment generated by the fire. A-71. The Forest Service collected extensive information on logging, including the miles of logging road construction, the number of acres to be harvested by logging system, and the erosion potential on those acres. A-91 to A-92. Specific harvest and transportation plans were provided

to the interdisciplinary team for analysis of environmental effects. A-90, A-92.

After exhaustively analyzing the Big Tower EA and its supporting administrative record, the district court found that sufficient information supported the Forest Service's decision to proceed with the Big Tower Salvage and Revegetation Project without preparing an EIS.[1] See generally A-21 to A-98.

The Ninth Circuit held that the Big Tower EA was inadequate because it did not provide a quantitative sediment estimate nor specifically identify the location of proposed roads or the number of stream crossings. A-12 to A-14.

The basis for federal jurisdiction in the Court of Appeals was 28 U.S.C. § 1291. A-4.

REASONS FOR GRANTING THE WRIT

1. Post-wildfire Environmental Analysis is an Issue of Great Public Importance.

Western national forests are extremely susceptible to devastating wildfires because of deteriorating forest health and an abundance of dead and dying timber. Concerned that the problem had reached epidemic proportions, Congress in 1995 enacted the Emergency Salvage Timber Sale Program.

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[1] Unlike the district court, the Court of Appeals held that the Forest Service finding of no significant impact must be supported solely by the EA without reference to the administrative record. A-14.

Pub. L. No. 104-19 § 2001, 109 Stat. 194, 240 (1995).[2] To effectuate its goals, Congress exempted timber salvage sales from compliance with NEPA and other laws until the Emergency Program expired. Id. at § 2001(i), 109 Stat. 245-46.

The Emergency Program and its exemption from environmental laws expired in 1997, but the threat of large wildfires remains. See Upper Columbia River Basin Draft Environmental Impact Statement, Vol. 1, Chap. 2, p. 45-50. Because large wildfires pose a far different planning and environmental analysis problem than conventional implementation of forest plans, the Forest Service and the courts would benefit greatly from clarification of NEPA requirements in the context of wildfires on public lands. Such clarification could obviate the need to set aside environmental laws as was done in the Emergency Salvage Timber Sale Program and enable the Forest Service to respond more rapidly when rehabilitating areas devastated by large wildfires.

2. The Decision is Contrary to Supreme Court Precedent.

The Ninth Circuit opinion requires that the Forest Service propose all conceivable actions in a vast area burned by a wildfire in the same environmental document, even if the actions are merely contemplated and have independent utility from the immediate proposed action. The decision is

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[2] The Conference managers emphasized that "the emergency forest health situation from fire, insect infestation, and disease has approached epidemic levels." H.R. CONF. REP. NO. 124, 104th Cong., 1st Sess. 134.

at odds with existing Supreme Court precedent and eliminates agency discretion by requiring that the Forest Service propose all projects for rehabilitation of a 51,000 acre fire area at once.

The fact that there are other "contemplated" rather than "proposed" actions does not rise to the level of significance requiring an EIS for rehabilitation of less than 10% of the area burned by fire. The Court has held that contemplated actions do not create "significance" requiring an EIS. Kleppe v. Sierra Club, 427 U.S. 390, 404 (1976)("[T]he mere 'contemplation' of certain action is not sufficient to require an impact statement.").

In Kleppe, plaintiffs argued that the Department of Interior had violated NEPA by not preparing an EIS for coal development in the Northern Great Plains Region, because the development was programmatically, geographically, and environmentally related. Id. at 412. Plaintiffs also claimed that an EIS was required because the coal projects would produce a wide variety of cumulative impacts throughout the Northern Great Plains Region. This Court held that the Department had not violated NEPA and emphasized that:

> determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.

Id. at 414. The Court concluded that a comprehensive EIS was not necessary, for:

> Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.

Id.

In this case, the rapid deterioration of trees in the most intensively-burned area of the fire was a "practical consideration of feasibility" that provided the rational basis for restricting the scope of the Big Tower EA. The EA excluded as proposals contemplated actions that were within the fire perimeter but outside the intensively-burned area. However, consistent with the Council on Environmental Quality ("CEQ") regulations, cumulative effects of the Project were thoroughly assessed. A-73 to A-83.

The CEQ regulations establish the scope of actions to be considered in an EIS and include connected actions, cumulative actions, and similar actions. 40 C.F.R. § 1508.25, A-120 to A-121. The Ninth Circuit concluded that an EIS is required if the actions are "reasonably foreseeable." A-17 to A-18. This sets a new standard that departs from the concrete proposal standard of NEPA and Kleppe. If all actions that are "reasonably foreseeable" must be fully developed as proposals in the environmental analysis, then the scope of the project becomes too broad for the agency to achieve its objectives.

The CEQ regulations give the agency discretion and state that an agency "may wish" to analyze "reasonably foreseeable" actions in the same EIS. The Ninth Circuit decision, in contrast, leaves the agency no choice, contrary to existing law. Instead, it compels the agency to develop all

reasonably foreseeable actions into proposals which, in turn, will require an EIS in every instance. Such a per se EIS rule is neither in the statute nor the regulations, but it fits well with the Circuit's insistence on a heightened degree of detail in EAs. If contemplated projects must be developed prematurely into proposals, the Forest Service never will have enough information to meet the exacting detail requirements imposed by the Ninth Circuit.

3. The Decision Obscures an Agency's Duty under NEPA.

This Court's guidance is needed to clarify an agency's duty under NEPA regarding the detail of environmental analysis required in an EA. NEPA, as its name implies, mandates a national environmental policy. 42 U.S.C. § 4331, A-112 to A-113. As such, NEPA must be implemented uniformly throughout the United States. Here, however, the Ninth Circuit blurred the line between EAs and EISs by imposing an unwarranted complexity requirement on the former. The Ninth Circuit's approach is at odds not only with NEPA and the CEQ regulations that guide federal agencies in implementing the Act, but it also is contrary to the approach taken by other Courts of Appeal that have addressed the issue. See, e.g., Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990); Sierra Club v. United States Forest Service, 46 F.3d 835, 840 (8th Cir. 1995). This Court should intervene to resolve the conflict generated by the Ninth Circuit's opinion on this important matter.

NEPA mandates the preparation of environmental documents to ensure that agencies engage in informed decisionmaking on matters that may affect the environment. Robertson v. Methow Valley Citizens Council, 490 U.S. 332,

349 (1989). Specifically, NEPA mandates the preparation of a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C), A-114. Neither NEPA nor the CEQ regulations dictate the type or amount of scientific information required in an EA, however.

The CEQ regulations guide agencies in determining whether an EIS is required for a proposed action. See generally 40 C.F.R. §§ 1500-08. If a proposed action neither normally requires an EIS nor is normally entitled to a categorical exclusion, then an agency must prepare an EA to determine whether an EIS is warranted. Id. § 1501.4, A-118. An EA functions as a triggering mechanism for further environmental study.

The CEQ regulations teach that an EA is a "concise" report that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." Id. § 1508.9, A-119 to A-120. Based on the EA, an agency either: (1) prepares a Finding of No Significant Impact ("FONSI"); or (2) prepares a detailed EIS. Id. § 1501.4, A-118 to A-119. The CEQ's definition of an EA thus contemplates a dichotomy in the level of detail required in an EA relative to an EIS. Further, in the event that an EIS is not triggered, the EA provides the basis for demonstrating that the agency took the requisite "hard look" at the potential environmental consequences of the proposed action. Methow Valley, 490 U.S. at 350 (quoting Kleppe, 427 U.S. at 410 n. 21). Nothing more is required nor expected of an EA.

In this case, the Ninth Circuit held that the Forest Service could not proceed without preparing an EIS because the Big Tower EA inadequately evaluated the proposed

action's effects on erosion and sediment delivery. A-12 to A-14. Apparently looking to the EA for a quantitative sediment estimate, and criticizing the Forest Service for a "fail[ure] to heed [the court's] warning" in an earlier case, the court stated that "'general statements about "possible" effects and "some risk"'" did not satisfy NEPA's "hard look" requirement. A-13. (citing Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) (Fletcher, J.)).

Notably, Neighbors of Cuddy Mountain was a case in which the Ninth Circuit evaluated the sufficiency of an EIS and a Supplemental EIS. Unlike those documents, EAs are not meant to answer every question in detail but rather aim to ensure that an agency conducts a reasonably thorough analysis. The Ninth Circuit's approach thus calls for an unwarranted level of detail in a document that often is only a preliminary step on the way to further analysis. It also obliterates the CEQ's distinction between EAs and EISs, despite the fact that "CEQ regulations are entitled to substantial deference." Methow Valley, 490 U.S. at 1848 (citing Andrus v. Sierra Club, 442 U.S. 347 (1979)).

In addition to obliterating the distinction between EAs and EISs mandated by the statute and its implementing regulations, the Ninth Circuit opinion also is at odds with the approach taken by other Courts of Appeals. In the Seventh Circuit, for example, an EA is viewed as:

> a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement – which is very costly and time-consuming to prepare and has been

> the kiss of death to many a federal project – is necessary.

Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990). Accord Rhodes v. Johnson, 153 F.3d 785, 788 (7th Cir. 1998). The Eighth Circuit, relying on the CEQ's description of an EA as "a concise public document," similarly recognized that "[a]n EA cannot be both concise and brief and provide detailed answers for every question." Sierra Club v. United States Forest Service, 46 F.3d 835, 840 (8th Cir. 1995). Accord Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 809 (8th Cir. 1998). See also Fund for Animals, Inc. v. Rice, 85 F.3d 535, 546-47 (11th Cir. 1996) (distinguishing a "brief and concise" EA from a time-consuming and expensive EIS).

Although petitioners do not assert that an intercircuit conflict exists, they note that other Courts of Appeal give effect to the difference in the level of information required in an EA relative to an EIS. The Ninth Circuit's opinion thus creates confusion for federal agencies, such as the Forest Service, that are charged with managing natural resources for multiple uses while at the same time complying with a complicated regulatory web of environmental laws. By respecting the distinction between EAs and EISs, the above-cited cases recognize that the EA is an essential tool for modern federal agencies. Imposing an undue complexity requirement on a public document designed to aid federal agency decisionmaking in an era of burgeoning administrative demands would interfere with effective natural resources management. Contrary to the workings of NEPA, it would create the untenable situation where an agency would prepare a detailed document akin to an EIS for every proposed action. The Ninth Circuit's approach likely would bring the workings of federal agencies such as the Forest

Service to a screeching halt due to time, budgetary and energy constraints. As a result, our nation's resources – the very resources envisioned as benefitting from environmental statutes such as NEPA – would suffer.

CONCLUSION

Contrary to this Court's teaching in Kleppe, the Ninth Circuit has eliminated agency discretion to define the scope of its action in responding to large wildfires. The Ninth Circuit also has set a heightened standard for detail in an environmental assessment that does not conform to NEPA.

Petitioners respectfully request that the Court grant the petition for writ of certiorari.

Respectively submitted this 2nd day of March, 1999.

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